simultaneously. Headquarters operations are exempt from the FCC's EEO Rule, and as shown in our study of baseline EEO data, headquarters operations tend to employ relatively fewer minorities and women than do broadcast stations. See pp. 40-41 supra.

Moreover, job consolidators often convert fulltime jobs into parttime jobs. This will bring many stations below the EEO Rule's station size cap, and it will leave more employees on the margin of the economy, with impaired ability to protect their civil rights.

Our purpose is not to criticize job consolidation, but to call attention to the fact that job consolidation is occurring at a time when the industry has not yet achieved equal employment opportunity. Intense pressure is being placed on the job security of the "last hired" -- who, more frequently than not, are minorities and women.70/

70/ In Glass Ceiling/Environmental Scan, p. 17, the Federal Glass Ceiling Commission reported that "[a] review of research on recent changes in the organization of work" disclosed

> seven ways in which downsizing and restructuring can limit opportunities for all managers, professionals, and administrators. They are: 1) an increase in external recruiting which reduces the number of internal career ladders; 2) elimination of layers of management and staff positions; 3) hiring of independent contractors or small businesses to perform some staff functions; 4) more stringent performance measures on those managers who remain; 5) more geographic mobility required of managers; 6) increased importance of team work; and 7) a shift of employment from manufacturing to services....Restructuring can present problems as well as opportunities for minorities and women in management. In some cases the last hired are the first fired. On the other hand, when early retirement is part of the restructuring process, higher level positions may become available, thereby increasing advancement opportunities.

[n. 70 continued on p. 65]

In a tight job market, minorities and women are in no position to invoke their Title VII rights. In a comparatively close-knit industry such as broadcasting, there is always intense pressure on discrimination victims not to sue because they can be branded as "troublemakers" and blackballed. This pressure is especially intense during periods of job consolidation. Discriminatory demotions are seldom challenged before the EEOC because such a challenge places the demoted individual at risk of having no job at all. In our experience, minorities and women facing a choice between (1) years of litigation coupled with being unemployed, or (2) a suboptimal job, will almost always choose the option which brings in some income.

The EEOC will not review a company's EEO performance absent a charge of discrimination. Thus, it is the responsibility of the FCC -- which is presiding over the media concentration which drives this job consolidation -- to step up its efforts to end systemic and otherwise unremediable discrimination. This is no time to exempt most broadcasters from meaningful civil rights enforcement.

4. As a result of the Telecommunications Act, the number of independent voices in local markets is declining rapidly

By directly controlling the number of independent voices operating in a local market, the local ownership rules were the Commission's most effective diversity-promoting policy. The loss of these rules underscores why the Commission must not deregulate

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70/ [continued from p. 64]

While some larger broadcasters operate early retirement plans which open the way for advancement of minorities and women attendant to "downsizing", most medium sized and smaller broadcasters do not operate these plans. Thus, minorities and women face intense job scarcity pressure attendant to broadcast industry consolidation.

EEO without first ascertaining the full impact of the Telecommunications Act on diversity of voices[71] -- a factor it failed to consider in adopting the NPRM.[72]

Such a review would disclose that the ownership consolidation in the wake of the Telecommunications Act has profoundly reduced viewpoint diversity by permitting large broadcasters to swallow smaller, independent ones.[73] See pp. 62-63 n. 69 supra. The need to compensate for this loss of diversity necessarily places greater

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71/ In its EEO Report - 1994, 9 FCC Rcd at 6284 ¶3, the Commission recognized that because of, inter alia, "the mergers occurring in the telecommunications industry" it must "continue to examine our current EEO rules to make them as meaningful and relevant as possible without unnecessary or burdensome restrictions."

72/ Although the NPRM was adopted in a Commission meeting held four hours after the President signed the Telecommunications Act, the NPRM never mentions the Act. It is as though the single most important legislative event affecting the industry in sixty years was unworthy of note in connection with a rulemaking proceeding whose subject is the Commission's only remaining initiative to promote diversity of viewpoints in broadcasting. Calling this a grave omission would offend mere material omissions.

73/ Radio station broker Gary Stevens "regret[s] that [the radio business] is getting more institutionalized ...[smaller owners are simply] out of luck." Rathbun. Even large companies like U.S. Radio, once the largest minority broadcaster with 18 stations, find it necessary to merge into much larger ones. Id.

Infinity's purchase of Granum Holdings L.P.'s twelve stations in a $410 million deal is a typical example of the victory of large companies over smaller -- even half-billion dollar -- companies. As Granum President/CEO Herb McCord put it, "[i]t's really become impossible for [Granum] to compete against the large publicly traded radio companies for buying stations." Donna Petrozzello and Elizabeth Rathbun, "Radio's Mega-Week," Broadcasting and Cable, March 11, 1996, p. 5.

A factor closely related to ownership concentration is the dramatic increase in time brokerage. The last time the Commission examined time brokerage was in 1992, when the Field Operations Bureau surveyed 284 stations. Only 17 of them (6%) engaged in time brokerage, of whom only six (2%) acquired at least 98% of their programming from a broker. Broadcast Station Time Brokerage Survey, 7 FCC Rcd 1658 (1992). If the Commission conducted the same survey today, the numbers would most likely be far higher.

pressure on the Commission's only remaining diversity-promoting tool -- the EEO Rule.[74] Unfortunately, the NPRM fails to consider the impact of the Telecommunications Act on EEO compliance.

5. Stations are changing hands much more frequently now than they were twenty years ago

Between February 8 and August 19, 1996, trading exceeded $11.4 billion. Trading in all of 1995 was $5.6 billion. Radio Business Report, August 19, 1996, p. 2. Declaring this trading "mind boggling", Radio Business Report observed that "[t]he amount of money that has changed hands in station trading this year is equal to one year's worth of advertising revenue for the entire industry." Id.

The acceleration of station sales means that almost no Title VII discrimination case can reach finality before the typical radio station changes hands. Finality in an EEOC case often requires the better part of two decades, but the typical radio station changes hands every two to four years. This acceleration in station sales has completely swallowed the Commission's NBC Policy, which holds that the Commission reviews individual allegations of discrimination only upon finality of any Title VII proceedings.[75] As a result, the Commission -- whose enforcement of

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74/ Gone are ascertainment, program percentages, the Fairness Doctrine, the Top 50 Policy, the Mickey Leland Rule, the comparative hearing policies, the distress sale policy, the Clear Channel eligibility rules, -- and most critically, the tax certificate policy. One after another, they were repealed, usually with pious assurances that, after all, we still have the EEO Rule to protect diversity. See pp. 82-83 n. 102 infra.

75/ The NBC Policy takes its name from NBC, Inc., 62 FCC2d 582 (1977) (Commissioners Hooks and Fogarty dissenting) ("NBC"). See discussion at pp. 235-244 infra.

[n. 75 continued on p. 68]

nondiscrimination in broadcasting is the most critical task in its character evaluation of licensees -- has almost no means to fulfill that responsibility except through its traditional process of reviewing licensees' EEO programs.76/

6. The renewal term is now eight years rather than three

EEO review occurs far more infrequently now than it did in 1976 -- reducing the amount of time broadcasters must spend on EEO matters and making it more difficult for citizens to challenge licenses for EEO violations.77/ Indeed, because a Bilingual investigation only covers three years of hiring data, the only occasion on which a station would ever be held accountable for EEO

75/ [continued from p. 67]

Even before the current wave of station trading, discrimination allegations almost never received FCC review. For example, in 1973, six African Americans filed race discrimination Title VII complaints against WSM Radio in Nashville. The Commission abstained from exercising jurisdiction, employing the NBC Policy. See WSM, Inc., 66 FCC2d 994, 1006-1008 ¶¶29-32 (1977) ("WSM"). The Title VII litigation concluded in 1989 with final orders to the effect that the licensee had discriminated against three of the plaintiffs. Unfortunately, by then the stations had changed hands three times -- meaning that the Commission would have had to unscramble three ownership "generations" of eggs to reach the discriminator. The FCC has only twice unscrambled a broadcast assignment of license and each case was extreme; see Michigan Television Network, Inc., 72 FCC2d 782 (1979) (an agent of a foreign government held an undisclosed interest in the applicant).

76/ As shown infra at pp. 176-188, the only instances in which the Commission has drawn an inference of discrimination have arisen from evidence developed from license renewal applications and Bilingual investigations. This is precisely the type of evidence which would be unavailable if the principal proposals in the NPRM are adopted.

77/ According to Electronic Media, "[b]ecause it's easier for broadcasters to keep licenses longer, it will be more difficult for public interest groups to challenge broadcast licenses for violations of equal employment opportunity rules." "How the new legislation will change media," Electronic Media, February 17, 1996, pp. 30-31.

violations occurring in the first five years of its license term would be in an evidentiary hearing.

At one time, the Commission relied on the shortness of the renewal period to hold noncompliers on a short leash. It can't do that anymore.78/

7. Broadcasters no longer need to face competing applications at renewal time

Since 1976, the Commission has employed short term renewals as a remedy in extreme cases, issuing 110 of them between March, 1990 and May, 1996. See Exhibit 2 hereto.

As an enforcement tool, the regulatory weight of a short term renewal used to be short of denial of renewal. Short term renewals derived their clout from the possibility that the station would be viewed as a scofflaw, prompting local entrepreneurs to file mutually exclusive applications when the shortened renewal term was about to expire.

The Telecommunications Act eliminated comparative renewals.79/ Consequently, a short term renewal has become a meaningless slap on the wrist, amounting to a requirement to file a postcard early.80/

78/ The Commission should also bear in mind that a station doesn't remain the same size every year. Smaller stations hope to grow into larger ones. If the station size cap were raised to ten stations in 1997, an eight-employee station in California would file no EEO Program with its 1998 renewal application. If this station became a twelve-employee station in 1999, it would operate without EEO accountability for seven years. The Commission can best avoid this problem by not raising the cap in the first place.

79/ 47 U.S.C. §309(k)(4) (1996).

80/ Forty-three (37%) of the 115 stations subject to forfeitures between March, 1990 and May, 1996 also received short term renewals. No station receiving a short term renewal did not also receive a forfeiture. See Exhibit 2.

The elimination of any significant risk of loss of license to a competitor -- and attendant inability to sell the station while the comparative renewal is pending -- has eviscerated much of the potential incentive for licensees to comply with the EEO Rule. To compensate for the loss of this incentive, the Commission must apply the EEO Rule more assiduously than it once did in order to achieve the same regulatory outcome.

8. The diseases of bigotry and intolerance have spread at an alarming rate, becoming the national symbols of the radio industry

A climate of racism continues to poison the land, emboldening those who would deny equal opportunity in the absence of strict federal oversight.81/

The resurgence of racism is most visibly apparent in the burnings of several dozen Black churches over the past several months -- a stark and surprising contrast to 1976.

81/ The President's 1995 affirmative action review found that "the evidence is overwhelming that the problems affirmative action seeks to address -- widespread discrimination and exclusion and their ripple efects -- continue to exist." Office of the President, "Review of Federal Affirmative Action Programs," July 19, 1995, p. 20 ("Affirmative Action Review"). Assistant Attorney General Deval Patrick explains:

> regrettably, discrimination on the basis of race, ethnicity and gender persists in this country: not just the effects of past discrimination, but current, real-life, pernicious discrimination of the here and now. Last year, for example, the Equal Employment Opportunity Commission received over 91,000 complaints of discrimination in employment alone. In the Civil Rights Division, we filed record numbers of cases last year and opened thousands of investigations, but we cannot keep up.

[n. 81 continued on p. 71]

At that time, the most active struggles of the civil rights were still alive within our recent memory, and the lessons of those struggles were remembered by the body politic. But to many of today's young people, those struggles are mere grist for an American history class. And too many of those old enough to remember have either chosen to forget, or they never learned.82/

The full scope of race prejudice in society today is perhaps best revealed by experiments conducted on a variety of industries between 1989 and 1993 by the Lawyers Committee for Civil Rights and the NAACP. These experiments involved pairs of "testers", each applying for the same jobs on the same days. The studies found that about 20% of employers discriminate at the point of entry into

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81/ [continued from p. 70]

> I believe that if any of you could sit at my desk, as Assistant Attorney General for Civil Rights, for a week, you would be astonished and saddened by the incidents of unfairness, disrimination, or even violence motivated by race, ethnicity or gender (to say nothing of disability) that still block access for far too many individuals to the bounty of opportunity that America has to offer.

Testimony of Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, Before the Subcommittee on Employer-Employee Relations, Committee on Economic and Educational Opportunities, United States House of Representatives, March 24, 1995, at 2.

82/ According to The Race Relations Reporter, "[a] poll by the National Opinion Research Center at the University of Chicago has determined that deep-seated racism is still widespread in the United States, most notably in southern states." The survey found that 19% of all southerners admitted that they believe Blacks are less intelligent than Whites; more than one quarter of White southerners openly expressed the belief that there should be laws against interracial marriage; and 44% of all southerners believe that they should have the legal right to refuse to sell their house to a person because of the prospective buyer's race. The Race Relations Reporter, August 15, 1996, p. 1.

the employment process when they think nobody is looking.[83] That evidence is consistent with the perceptions and experiences of American workers,[84] and with the conclusions of the Federal Glass Ceiling Commission.[85]

If the broadcasting industry behaves the same way -- and there is no reason to believe that it doesn't[86] -- the Commission erroneously grants 20% of the license renewal applications it processes.[87]

Thus, absent FCC EEO enforcement, the open racism of some broadcasters and the "benign neglect" of others would combine to bring the advances of minorities in broadcasting to a screeching halt. The best evidence of how the broadcasting industry would approach EEO in the absence of FCC oversight (or, as envisioned by

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83/ See Affirmative Action Review, pp. 20-21.

84/ According to a study by the National Law Journal, "[m]ost Americans believe employers discriminate in hiring and promoting workers...While the vast majority of those reporting job discrimination did not take formal action, many now say they are more likely to seek legal redress. Seventy-eight percent of adult Americans believe some, more or all employers practice some form of discrimination in their hiring or promotion practices," despite official equal opportunity policies. Fifty-one percent specified that 'all or most' employers are guilty of discriminatory practices, while 25 percent said they have been discriminated against on the job." National Law Journal, July 16, 1990, p. 1.

85/ The Federal Glass Ceiling Commission concluded that "prejudice against minorities and white women continues to be the single most important barrier to their advancement into the executive ranks." Glass Ceiling/Environmental Scan, p. 6.

86/ The Commission has granted every renewal application since February 2, 1994. It cannot honestly say that none of these broadcasters discriminated. The truth is that even one discriminator being granted renewal is one too many.

87/ Nothing inherent in the nature of the broadcasting industry renders that industry definitionally or structurally either more or less racist than the society it mirrors. The industry's pre-EEO Rule history proves that. See Declarations of Dr. Everett Parker and Henry Geller, Exhibits 4 and 5 hereto.

the NPRM, by the withdrawal of FCC oversight for a large portion of the industry) is found in the behavior of the industry between 1964, when discrimination was outlawed by Title VII, and 1969, when the EEO Rule was adopted. That period brackets the years during which the broadcasting industry operated under a legal and regulatory structure identical to that contemplated by the NPRM. Henry Geller, the General Counsel of the FCC during that period, explains:

> In my view, the time between 1964 and the FCC actions in 1968-69 was a period when the broadcast industry simply was not fully engaged in eliminating employment discrimination and fostering equal employment opportunities for minorities in its hiring and training efforts. After the adoption of the EEO rules and follow-up revisions, making this area a crucial facet of renewal, the broadcaster became much more focused on this important and vital public interest responsibility. I stress that the Commission, with the full backing of the EEOC and Department of Justice, adopted the EEO policy in the broadcast field precisely to move from the slow progress involving equal opportunities to one that made equal opportunities a critical linchpin of the broadcaster's public stewardship and thus that spurred strong steps to eliminate discrimination, including by indifference, and to foster equal opportunities.

Declaration of Henry Geller, Exhibit 3 hereto, p. 3.

Another example of how the broadcasting industry would treat its EEO obligations if EEO were not regulated is found in the composition of the unregulated station brokerage business. Virtually all station brokers were once broadcasters -- indeed, they were among the most successful broadcasters. To be successful in their business, they must reflect the values and mores of the industry as a whole -- just as many real estate brokers who oppose housing integration reflect the values and mores of the buyers and

sellers they represented. The brokerage business could not be more racially exclusive: of the approximately 150 brokers, none is Black and only one (an independent who trades only in Spanish language stations) is Hispanic. We know of not one broker who has even trained or provided an internship to a minority. Yet these gifted individuals are the cream of the broadcasting industry.

The industry has done little to create a public image of being a bastion of equal opportunity. In the 1970's, the leading national broadcasters -- Reasoner, Kuralt, Cronkite -- stood for tolerance and understanding. Today, the industry boasts and toasts talk show bigots and lawbreakers.

Bigotry and intolerance have become the national signature of the radio industry. Edward R. Murrow is spinning in his grave.

9. Discriminators have become much more sophisticated in concealing their actions

By the middle 1970's, the D.C. Circuit realized that discrimination was being transformed into "a subtle process which leaves little evidence in its wake." Bilingual Bicultural Coalition on the Mass Media v. FCC, 492 F.2d 656, 659 (D.C. Cir. 1974) ("Bilingual I"). As explained at p. 9 supra, the nature of employment discrimination has changed profoundly since 1976.

Over the past twenty years, discriminators have become much more sophisticated in concealing their actions. The Commission will never again be faced with a licensee inept enough to say, in its renewal application, that it will recruit minorities for "suitable" positions when "feasible",[88/] or one brazen enough to ask a job counsellor "don't you have any white girls to send me?

88/ Rust (HDO), 53 FCC2d at 363.

This one would make charcoal look white."89/ And while there is still no lead female anchor of a national network weeknight newscast, it is unlikely that any network executive today would tell a female correspondent "out loud and without hesitation, 'we don't hire women to do that. We will not hire women'", as Cokie Roberts was told in 1964.90/

It is a seminal principle of law enforcement that when lawbreakers grow more sophisticated in concealing their misconduct, the police should redouble their enforcement activity. How unfortunate that the NPRM takes exactly the opposite approach.

10. The EEOC's enforcement abilities are a shadow of what they were twenty years ago

The FCC is much less able now than in 1976 to rely on the EEOC to resolve individual discrimination grievances in a timely and effective manner. The EEOC has suffered severe cutbacks in its

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89/ Catoctin, 4 FCC Rcd at 2553, 2554-55 ¶¶15-16.

90/ Junior Bridge, "Diversity, Multiculturalism & the Media," Quill, July/August, 1995, pp. 16-17. Nor would a television station be so brazen as to hire no women in the newsroom until faced with a license coming up for renewal -- as Jane Pauley experienced early in her career. Ms. Pauley gave "praise...to the FCC because I got my job at WISH-TV in Indianapolis because they had to find a woman. It was FCC license renewal time, and there were no women in the newsroom." Id.

budget, resulting in a seven year backlog of cases[91/] and an inability to investigate cases in which the alleged discriminator may have successfully concealed his intentional conduct.[92/] To put it gently, the agency is thoroughly demoralized.[93/]

91/ The EEOC estimates it could boost its performance in 1997 in resolving discrimination cases with a 15% budget increase, "but Congress is unlikely to approve any additional funds or personnel for EEOC." The EEOC "faces a backlog of 97,000 charges by individuals filed in prior years" and the EEOC "does not expect to resolve all the charges it anticipates receiving this year, thereby adding to the backlog. Fair Employment Report, April 10, 1996, p. 61. Title VII enforcement "is so slow that some people wait a decade for the federal government to resolve their complaints" according to the United States Commission on Civil Rights. For example, the EEOC received 71,563 private sector employment complaints in 1994, but it had a backlog of 96,945 pending cases and fielded 91,189 new complaints. In 1981, the EEOC received, 56,228 private sector complaints and resolved 71,690, leaving 48,300 cases pending. In fiscal 1994, the EEOC received 34,961 more complaints overall than it received in fiscal 1981, but had 526 fewer employees." "Federal Commission Criticizes Slow Enforcement of Civil Rights," The Washington Post, June 24, 1995, p. A-6.

The backlog will be piled even higher and deeper. The EEOC expects 100,000 new charges in 1996. There has been a 49% increase in individual charges in FY 1995 compared to FY 1991. "EEOC Adopts National Enforcement Blueprint to Tackle Rising Caseload," Fair Employment Report, February 14, 1996, p. 27. Despite its growing workload, its FY 1996 annual budget of $233 million would be increased only $7 million if the Commerce, State, Justice appropriations bill, H.R. 3814, is adopted. Fair Employment Report, August 14, 1996, p. 132.

92/ In 1994, EEOC issued 36,377 cause determinations following a full investigation -- and 94.7% of these, or 34,451, resulted in no-cause findings in favor of the defendants. There were only 1,926 determinations of cause, merely 5.3% of the total determinations. Fair Employment Report, May 8, 1996, p. 75.

93/ "The average EEOC investigator handled 123 cases at a time last year, more than double the average of about 55 in 1990. It can take an agency lawyer a year or more to get to a case." Kirstin Downey Grimsley, "EEOC Chief Voices Frustration Over Case Backlog, Budget Cuts," The Washington Post, February 11, 1996, p. A-4. During his first sixteen months in office, the EEOC's Chairman, Gilbert Casellas, could not get a call to the White House returned. Chairman Casellas declared publicly that "[n]obody gives a crap about us." Id.

11. National civil rights organizations possess relatively far fewer resources than they did twenty years ago

The workload faced by the national civil rights organizations is greater now than ever before. Redressing discrimination in the media continues to be a high priority for these organizations. However, each of these organizations, particularly the NAACP, is impaired by an unprecedented shortage of investigatory and legal staff and financial resources. This necessarily means that much discrimination goes unexposed, unreported and unlitigated.

12. Minority owners are being forced out of the industry at warp speed

One statement in the NPRM deserves a lot of credit from us: its seminal recognition that "employment discrimination in the broadcast industry inhibits our efforts to diversify media ownership by impeding opportunities for minorities and women to learn the operating and management skills necessary to become media owners and entrepreneurs." NPRM, 11 FCC Rcd at 5167 ¶3 (fn. omitted). See also id. at 5173 (Separate Statement of Commissioner Susan Ness).94/ Congress also understands the symbiotic

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94/ See also Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (NOI), FCC 96-216 (released May 21, 1996) ("Market Entry Barriers") at 27 ¶38 ("[r]ace or gender discrimination in employment may impede participation and advancement in the communications industry. Employment provides business knowledge, judgment, technical expertise, and entrepreneurial acumen, and other experience that is valuable in attaining ownership positions"); [citations continued on the following page]

[n. 94 continued on p. 78]

relationship between EEO and minority ownership.95/

This symbiotic relationship has two components. First, minority owners are a point of entry and a fair treatment sanctuary for minority broadcast professionals.96/ Second, equal opportunities provided by nonminority broadcasters help minorities

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94/ [continued from p. 77]

Minority and Female Ownership of Mass Media Facilities (NPRM), 10 FCC Rcd 2788, 2970 n. 22 (1995) ("Minority Ownership - 1995") ("it is often the case in the mass media industry that station or system owners were once employees of that facility or of another facility. Thus, increasing minority employment in the mass media may ultimately contribute to increased minority ownership"); EEO Forfeitures, 9 FCC Rcd at 929-30 ¶3 ("increased employment opportunities are the foundation for increasing opportunities for minorities and women in all facets of the communications industry, including participation in ownership"); Amending Broadcast EEO and FCC Form 395, FCC 80-328 (June 25, 1980) at ¶13 (the "EEO requirements and policies favor....minority ownership so that programming will reflect the needs and interests of minority groups.")

95/ EEO requirements are "particularly important in the mass media area where employment is a critical means of assuring that program service will be responsive to a public consisting of a diverse array of population groups and to assure that there will be a sufficient number of minorities and women with professional and management experience who will be able to take advantage of ownership opportunities." H.R. Rep. No. 934, 98th Cong., 2d Sess. 4723 (1984).

96/ See Honig, "Relationships among EEO, Program Service, and Minority Ownership in Broadcast Regulation," in Proceedings of the Tenth Annual Telecommunications Policy Research Conference 85, 87-88 (1983) ("Honig"). This study found, inter alia, that 72% of management employees at Black owned stations were Black but 38% of management employees at White owned stations were Black. The study controlled for format; all of the stations in the study had Black (urban) formats. See also Felix F. Gutierrez and Jorge Schement, Spanish Language Radio in the Southwestern United States, Austin: Center for Mexican American Studies, University of Texas (1979), discussed in Marilyn Fife, "Promoting Racial Diversity in U.S. Broadcasting," in 9 Media, Culture and Society 481, 495 and 501 n. 16 (1987) (studying Hispanic and non-Hispanic owners of Spanish formatted stations and reaching conclusions similar to those in Honig).

obtain the skills needed to become owners.97/

Yet as a consequence of the loss of the tax certificate policy and the growth of local superduopolies, minority owners are being forced out of the industry at warp speed.98/ Few new ones are gaining a foothold.

The tax certificate policy, which accounted for 2/3 of minority owned stations, was repealed in April, 1995. According to MMTC, minorities own fewer than 3% of all broadcast stations, comprising less than half of one percent of industry asset value.99/ And according to AWRT, only about 3% of television stations and two percent of radio stations are owned by women.100/

Virtually all of the approximately two dozen minority owners who received broadcast licenses through the Docket 80-90

97/ In Edens Broadcasting, Inc., 8 FCC Rcd 4905, 4908 (1993) (Statement of Commissioner Andrew C. Barrett, Concurring in Part and Dissenting in Part), Commissioner Barrett questioned "how our minority ownership policies can continue to have some impact, where minorities constantly are penalized for a lack of broadcast or cable management level experience (fn. omitted). If the FCC does not continue efforts to aggressively enforce its EEO rules, minority employment and minority ownership in the media industry will continue to suffer."

98/ "What may happen to minority-owned media companies is what may happen to all of those smaller, out-of-the-mainstream voices in the new age of consolidation. As the big get bigger, the smallest get lost." "Embracing diversity," [Editorial], Electronic Media, August 21, 1995.

99/ NTIA's annual survey of broadcast station ownership reports that minorities still own only 2.9% of broadcast stations -- the same percentage as in 1993. NTIA Director Larry Irving called these results "pretty dismal." Noting that NTIA's figures do not reflect the 1995 repeal of the tax certificate policy, Mr. Irving said that "[d]ata collections over the next couple of years could show the situation getting worse." He added that while spinoff sales as a result of mergers formerly resulted in some new minority owners because of tax advantages to station sellers, this incentive is no longer present. Communications Daily, June 28, 1996, p. 11.

100/ Jennifer Connerman, "Media Watch," In These Times, April 29, 1996.

proceedings obtained the necessary broadcast experience at radio stations. Thus, had the UCC III court not overruled Nondiscrimination - 1976, minorities' representation in station ownership would be much more attenuated than it is now. Similarly, if the Commission repeats the mistake it made in 1976, minority ownership in the year 2016 will be considerably more attenuated than it might otherwise be.

The impact on minority ownership -- standing alone -- justifies a policy of no retreat on EEO.

13. Under deregulation, stations are no longer required to serve minority audiences

One of the most profound "changed circumstances" since 1976 was the deregulation of radio and television program service.

The most critical element of deregulation was the Commission's abandonment of the requirement that each broadcaster must provide service to its entire community. After deregulation, if one station in a market is thought to be serving minorities, no other station in the market is required to do so, and other stations may elect to serve nonminorities exclusively. Deregulation of Radio, 84 FCC2d 968, 991 (1981) ("Deregulation of Radio"), recon. granted in part, 87 FCC2d 797 (1981), aff'd in pertinent part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983). This was a dramatic change from the regulatory structure which had been in place for nearly a generation. See En Banc Programming Inquiry, 44 FCC 2303, 2314 (1960) (each station was expected to serve minority groups).

Deregulation has adversely affected the prospects for equal employment opportunity in two ways.

First, deregulation removed one of the strongest incentives stations formerly had to hire minorities and women. Before deregulation, a broadcaster was motivated to reach above and beyond the minimal commands of the EEO Rule by hiring a minority or woman to assist him in fulfilling his responsibility, as a licensee, to meet the needs of minorities and women -- that is, to directly foster the diversity-promoting purpose of the EEO Rule.

That incentive is gone. The reason is simple: the broadcaster's responsibilities as a licensee no longer include the responsibility to serve minorities and women. A corollary effect is that as long as one station in the market goes out of its way to provide programming (and presumably EEO) sanctuary to the minority community, minority media professionals may not assume that any of the other stations will do more than abide by the minimal requirements of the EEO Rule.101/

Second, deregulation has ended the ascertainment process, through which nonminority broadcasters often came to meet and interact with minority community leaders they might never have met otherwise. These contacts often paved the way for the community groups to be included as recruitment sources by broadcasters. After the end of ascertainment, relatively few broadcasters

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101/ Steven Weissman's analysis of how deregulation has impaired minority access to broadcast programming also illuminates how deregulation has hurt EEO. Weissman explains that "the new rules, by shifting the responsibility for minority-oriented audiences, deals a harsh blow to efforts to achieve representational... objectives....The resulting shift of the burden of covering minority issues away from stations with a general listenership defeats the representational objective of having the minority's presence acknowledge by the population at large...." Steven Weissman, "The FCC and Minorities: An Evaluation of FCC Policies Designed to Encourage Programming Responsive to Minority Needs," 16 Columbia Journal of Law and Social Problems 561, 588-89 (1981) ("Weissman").

continued those structured personal contacts. As Steven Weissman has observed, "the discontinuation of required face-to-face interviews between responsible station personnel and leaders of minority groups eradicates an effective method of increasing the sensitivity of operative personnel to minority individuals[.]" Weissman, 16 Columbia Journal of Law and Social Problems at 588-89. Indeed, it is not uncommon for newly licensed broadcasters and absentee owners to know few minorities on a first-name basis.

14. Every diversity promoting FCC regulatory initiative except EEO is gone

Since its last systematic look at broadcast EEO, the Commission has extensively deregulated in every other substantive area: postcard renewals, ascertainment and program content percentage standards, the Fairness Doctrine, five year TV and seven year radio renewals, the duopoly rule, the Top 50 Policy, the 7-7-7 and the 12-12-12 rule, the Mickey Leland (14-14-14) rule, most distress sales (for want of stations placed in hearing), most comparative hearings for new facilities, and the AM clear channel eligibility criteria favoring minority ownership. The Commission frequently reassured opponents of deregulation by noting that the

EEO Rule (and/or the minority ownership policies) survived to promote diversity.102/

102/ For example, in Deregulation of Radio, 84 FCC2d at 1036, the Commission held that "it may well be that structural regulations such as minority ownership programs and EEO rules that specifically address the needs of these groups is preferable to conduct regulations that are inflexible and often unresponsive to the real wants and needs of the public." It concluded that the minority ownership policies and EEO rules, rather than direct regulation of broadcast content, were the preferable means of achieving diversification. Id. at 977.

See also Amendment of §73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations), 75 FCC2d 587, 599 (1979) (Separate Statement of Chairman Ferris) ("Top 50 Policy Repeal"), aff'd sub nom. NAACP v. FCC, 682 F.2d 993 (D.C. Cir. 1982); Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments, Second Report and Order, 101 FCC2d 638, recon. denied, 59 RR2d 1221 (1985), aff'd sub nom. NBMC v. FCC, 822 F.2d 277 (2d Cir. 1987); Deletion of AM Acceptance Criteria in §73.37(e) of the Commission's Rules, 102 FCC2d 548, 558 (1985), recon. denied, 4 FCC Rcd 5218 (1989); Nighttime Operations on Canadian, Mexican and Bahamian Clear Channels, 3 FCC Rcd 3597 (1988), recon. denied, 4 FCC Rcd 4711 (1989); cf. Revision of Radio Rules and Policies (Report and Order) (MM Docket 91-140), 7 FCC Rcd 2755, 2769-70 ¶¶26-29 (1992) (relying on minority ownership policies to advance diversification goals, even as the Commission deleted one of those policies, the Mickey Leland Rule.)

The courts have approved the FCC's reliance on EEO (and minority ownership) as preferred means of addressing diversification goals. See Metro, 497 U.S. at 554-55 (discussing the diversity- promoting role of the EEO Rule); NAACP v. FCC, 682 F.2d at 1003-1004 (the Commission "has not improperly exercised its discretion by relying on [its minority ownership, employment and programming policies] rather than the Top-Fifty Policy, to advance minority goals.")

Thus, -- by default -- the EEO Rule has become enormously more central to the Commission's broadcast regulatory duties than it was in 1976. The Commission now relies almost exclusively on EEO to foster diversification of viewpoints. Indeed, the Commission has no tool other than EEO with which to make the affirmative public interest determination required at license renewal time by Section 309 of the Act.

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The foregoing analysis has identified most, if not all, of the regulatory, structural, economic and social factors which might represent "changed circumstances" as interpreted in the NPRM, 11 FCC Rcd at 5168 ¶30. Every one of these factors weighs heavily against EEO deregulation and for much more aggressive EEO regulation. To paraphrase the Second Circuit in UCC III, it is beyond dispute that the need for equal employment opportunity has become much more urgent in the intervening years.

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B. The four factors rejected by the Court in UCC III were unworthy then and are unworthy now

The UCC III court rejected all four factors relied on by the Commission in Nondiscrimination - 1976 to justify raising the cap on station size for EEO compliance purposes. The four factors, as summarized by the Court, were:

1. the FCC has limited resources, so a reduction in jurisdiction would make enforcement efforts as to covered stations more effective;

2. smaller stations "have no formal personnel procedures that can be reformed and because the statistics that are yielded by EEO submissions from such stations are not reliable due to the small number of people in each sample";

3. "because the EEO programs serve little purpose for small stations, the burden they impose on such stations is unjustified"; and

4. "the great majority of industry employees are still covered under the new regulations."

UCC III, 560 F.2d at 533.

Each of these four factors, which proved unavailing to the Court in UCC III, is even less availing now than it was in 1977.

1. Agency resource limitations, if they exist, do not justify abandoning civil rights commitments before their goals are achieved

The overly facile claim of "limited resources" always invites regulatory mischief. Its incantation could theoretically be a reason for an agency to change course and abandon any program at any time, and for any reason. Resource allocation is inherently a judgment about the relative needs of competing priorities -- a political question which has no place in a rulemaking proceeding.

Claims of "limited resources" have long been used to rationalize opposition to enforcement programs. Indeed, a claim of "limited resources" was the basis for much of the internal

opposition at the FCC to the adoption of the EEO Rule. See Declaration of Henry Geller, Exhibit 4 hereto; see also discussion in Nondiscrimination - 1969, 18 FCC2d at 243, Nondiscrimination - 1971, 23 FCC2d at 433 n. 4, and UCC III, 560 F.2d at 533.

The NPRM does not contend that the resources available for EEO enforcement are insufficient to permit continued regulation of the entire industry.103/ Indeed, over the past year, the EEO Branch has made major strides in catching up with its docket and in issuing thorough (if not always helpful) opinions with reasonable speed.104/ Until recently, it took three years to review petitions to deny; now, most petitions are resolved in about one year, and some much more rapidly than that.105/ Years of institutional memory and experience in the Branch (which enjoys the services of a number of very long tenured, expert attorneys and staff) have mooted any "limited resources" issue.

A "resource allocation" argument is especially unavailing for the regulation of smaller stations. EEO regulation of smaller

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103/ The NPRM neither claims nor contains data supporting a claim that its EEO Branch is overburdened. Thus, the Commission is precluded from so asserting in its decision in this proceeding. AM Clear Channels (Report and Order), 101 FCC2d 1 (1985), recon. granted in part, 103 FCC2d 532 (1986), reversed in part, NBMC v. FCC, 791 F.2d 1016 (2d Cir. 1986) (subsequent history omitted) (reversing rulemaking decision because agency withheld facts from the public during the rulemaking proceeding).

104/ Until about a year ago, the Commission frequently erred in its EEO decisions by failing to address (or, sometimes, even mention) material contentions raised by petitioners to deny or informal objectors. That day is over. Very seldom does a recent EEO decision fail to dispose of all material contentions.

105/ It is tempting to be critical of Bloomington Twin Cities Broadcasting Corporation, FCC 96-299 (released July 24, 1996) ("Bloomington") (reviewing ab initio an EEO record running from 1982 through 1989). But in fairness, Bloomington is an aberration.

stations is extremely cost-efficient because it requires virtually no effort from the FCC except once in eight years. At that time, the Commission's effort attendant to renewal is slight. As the Commission recognized when it adopted the EEO Rule -- and should restate now in case there is any doubt -- "the depth and detail of any station's equal opportunity program will be expected to vary not only with the racial makeup of the community and area, but also with the size of the station. We do not expect smaller stations to submit elaborate programs. On the contrary, we recognize that with such smallness, a simpler response is correspondingly to be expected." Nondiscrimination - 1970, 23 FCC2d at 433.

In UCC III, 560 F.2d at 533, the Court rejected the Commission's contention that a reduction in jurisdiction would make its EEO enforcement of covered stations more effective. Wisely, the NPRM promises no "shift of resources" from smaller to larger stations.106/ Nor should it. If a large station is an EEO complier, it should not be targeted by the Commission's enforcement staff just because it is large -- and vice versa.107/

106/ One of Chairman Fowler's first acts in office was to meet with civil rights organizations' representatives and manifest his intention to shift resources in the EEO Branch away from smaller stations and toward larger stations and the networks. It never happened. Chairman Fowler decimated the EEO Branch, allowing it to conduct only one Bilingual investigation in six years. In 1987, among Chairman Patrick's first acts in office was to restore the EEO Branch's funding and enforcement powers. His reasoning impressed the civil rights community as entirely principled: if the Commission is going to have an EEO Rule, the Rule ought to be enforced as thoroughly as any other rule is enforced.

107/ Some organizations which challenged broadcast licenses in the early 1970's were criticized for targeting stations based on the size (or vulnerability) rather than on the extent to which the stations had violated the Commission's rules. That criticism is not made anymore. Having the advantage of experience, citizen organizations now examine the stations' compliance records irrespective of the stations' size or other irrelevant factors.

2. The limited statistical showings for smaller stations do not justify abandoning EEO compliance review for these stations

a. The limited Form 395 data generated by smaller stations is no impediment to meaningful EEO review of these stations

In 1976, the Commission was concerned that the only useful data available on smaller stations' EEO compliance were the rudimentary statistics drawn from Form 395 for a three year period. Nondiscrimination - 1976, 60 FCC2d at 240-41 ¶38. That problem has been solved in two ways.

First, with a longer renewal term, the Commission will examine eight years of data. Therefore, it can ascertain systematic patterns of minority underrepresentation not apparent from three years of data.108/

Second, the Commission no longer relies as heavily on Form 395 data. In 1987, it wisely redesigned its EEO compliance review process into one primarily based on efforts rather than numbers. Broadcast EEO - 1987, 2 FCC Rcd at 3967.

b. EEO compliance information on all stations is needed to monitor industrywide equal opportunity

Without EEO enforcement data for smaller and larger stations alike, the Commission cannot monitor industrywide EEO performance. Even if the Commission never reviewed or sanctioned a single "small

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108/ Furthermore, other statistical data besides that on Form 395 is available to the Commission. MMTC's study, "EEO Programs and EEO Performance at Tennessee Radio Stations" (the "Tennessee Study", found at Exhibit 1 hereto) observed that smaller stations tend to have higher job turnover rates than larger ones. See pp. 48-49 supra. Thus, even where raw numbers of employees do not provide an adequate statistical database for review of a smaller station's EEO performance, a meaningful statistical measurement of a smaller station's EEO performance may be taken by reviewing minority and female hiring over a period of years.